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No. 88-2003

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

MARK ROLLINSON AND EDMUND S. BARRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the government's action to recover on petitioners' guaranty of a debt is barred by the six-year statute of limitations in 28 U.S.C. 2415(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 866 F.2d 1463. The opinion of the district court (Pet. App. 1b-10b) is reported at 629 F. Supp. 581.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1989. A petition for rehearing was denied on April 17, 1989. The petition for a writ of certiorari was filed on June 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 16, 1973, Sounds Reasonable, Inc., a District of Columbia corporation in the music business, entered into a loan agreement with the District of Colum-

bia National Bank of Washington. Sounds Reasonable borrowed $120,000 at 11% interest, with monthly payments of $2,055 to be made until October 16, 1980. The Small Business Administration (SBA) guaranteed 90% of the loan. Pet. App. 2a-3a. In order to induce the bank to loan the money and SBA to guarantee repayment, petitioners personally guaranteed the loan's repayment.[1] Petitioners signed an agreement that:

> grant[ed] to Lender full power, in its uncontrolled discretion . . . to deal in any manner with the Liabilities and the collateral, *including* . . . [*the power to*] *modify or otherwise change any terms* of all or any part of the Liabilities or the rate of interest thereon (but not to increase the principal amount of the note of the Debtor to the Lender), *to grant any extension or renewal thereof* and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto[.]

Pet. App. 17a-18a. Petitioners' promises also ran to the bank's "successors and assigns." Pet. App. 1c.

Sounds Reasonable was soon unable to meet its obligations and became delinquent in repaying the loan as early as October 1974. Over the next few years, the bank granted Sounds Reasonable a series of five deferrals of principal payments; SBA approved those actions. Sounds Reasonable, however, continued to miss scheduled payments and thus the bank made demand on SBA for payment of the guaranteed portion of the loan. SBA paid its obligation, and the bank assigned the note to SBA on April 11, 1978. Pet. App. 3a-4a.

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[1] Three other persons also guaranteed the debt. One person settled with the government, another is dead, and the third person has not been located. Pet. App. 3a n.1.

On February 5, 1979, SBA and Sounds Reasonable entered into a modification agreement whereby Sounds Reasonable's past installments were deferred, the maturity date of the note was extended by nine years, and the monthly installments were reduced by about one-third. Sounds Reasonable made its only payment under the new agreement in March 1979. Accordingly, on October 25, 1979, SBA made demand upon petitioners for payment on their personal guaranties. Petitioners refused to pay, and on November 6, 1984, the government filed this action. Pet. App. 4a.

2. The district court granted summary judgment in favor of the government. Pet. App. 1b-10b. The court rejected petitioners' argument that this action was barred by the statute of limitations. Section 2415(a) of Title 28 provides that an action by the United States upon a contract must be filed "within six years after the right of action accrues." The court reasoned that the government's "cause of action was not perfected until a demand was made." Pet. App. 4b. The court then observed that, although the bank and SBA could have earlier demanded payment, SBA first made such a demand on October 25, 1979. *Ibid.* Accordingly, the district court held that this action, which was filed on November 6, 1984, was "well within the six-year statutory period." *Ibid.*

3. The court of appeals affirmed. The court of appeals found support for the district court's rationale (Pet. App. 9a), but affirmed the judgment on a different ground. The court focused on the modification agreement entered into in 1979 by Sounds Reasonable and SBA. The court surveyed various sources of law and noted "the general rule * * * that changes by the principals will not affect the running of the statute of limitations against a guarantor." Pet. App. 14a. But the court noted that this general rule "presumes the absence of consent to the changes. Thus, where

a guaranty does not vest in the holder the right to extend or modify the note, such conduct will not affect the running of the statute against the guarantor." *Ibid.* The court of appeals concluded, however, that "[t]he general rule will * * * yield when an agreement vests these powers and when the powers are exercised." *Ibid.*

In this case, the court of appeals noted that petitioners signed a guaranty that gave the holder of the note the power to modify the loan arrangement. Pet. App. 17a-18a. That power was exercised in 1979 when SBA and Sounds Reasonable entered into a loan modification agreement. Accordingly, the court of appeals held "that the 1979 modification agreement effectively renewed the statute of limitations against the guarantors [and] this action was filed within six years of that extension." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Thus no further review is warranted.

1. The judgment is correct for the reason stated by the district court. See Pet. App. 3b-4b. The government's cause of action did not accrue until SBA declared a default and accelerated Sound Reasonable's obligation to pay its debt. In *United States* v. *Cardinal,* 452 F. Supp. 542, 547 (D. Vt. 1978), the court stated the applicable rule: "[W]here the acceleration of the installment payments in case of default is optional on the part of the holder, then the entire debt does not become due on the mere default of payment but affirmative action by the creditor must be taken to make it known to the debtor that he has exercised his option to accelerate." Accord *United States* v. *Gilmore,* 698 F.2d 1095, 1098 (10th Cir. 1983) (statute

of limitations did not begin to run until SBA exercised its option under the acceleration clause); *Nyhus* v. *Travel Management Corp.*, 466 F.2d 440, 452 (D.C. Cir. 1972) ("Where a demand is necessary to perfect a cause of action, the statute of limitations does not commence to run until the demand is made.").

As the district court observed, the "promissory note at issue here * * * gives the holder of the note the authority to determine when the debtor is in default." Pet. App. 3b. SBA could have declared a default on May 12, 1978, when it acquired the note, but it did not. Instead, SBA first made its demand—and thus perfected its cause of action—on October 25, 1979, less than six years before the government filed this action. Hence, this action is not barred by the statute of limitations in 28 U.S.C. 2145(a).[2]

2. The judgment is also correct on the independent ground explained by the court of appeals. See Pet. App. 10a-19a. It is well settled that a guarantor may agree in advance to guarantee a principal's future agreements; if he does, then he may be held liable under the new agreement "even if he did not specifically agree to guarantee [the] particular" agreement. Pet. App. 12a. See *Valley National Bank* v. *Foreign Car Rental, Inc.*, 157 Colo. 545, 549, 404 P.2d 272, 274-275 (1965). The court in *Republic National Bank* v. *Meridian Properties, Inc.*, 530 F. Supp. 169 (D. Colo. 1982), applied that rule. In that case, the debtor (Meridian) and its creditors entered into a modified settlement agreement after the debtor had trouble meeting its obligation under a note. The holder of the note contended that the modified agreement reset the statute of limitations for the note's guarantors. The court agreed, noting that

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[2] As the district court held, SBA's decision not to declare a default earlier was not "unreasonable in view of the SBA's mandate to assist in the development of small businesses." Pet. App. 4b n.2.

the original guaranty agreement allowed the debtor to "renew or extend any obligations of Meridian." *Id.* at 171. The court held: "Because defendant * * * was a continuing guarantor for Meridian, for its new obligations and for its renewals and extensions, he was bound by the subsequent settlement agreement, even though he did not personally sign it." *Id.* at 172. Accord *FDIC* v. *Petersen,* 770 F.2d 141, 143 (10th Cir. 1985).

In this case, petitioners signed a guaranty that gave the holder of the note the power to "*modify or otherwise change any terms*" of the loan and "*to grant any extension or renewal thereof.*" Pet. App. 17a-18a. Petitioners do not dispute that the 1979 agreement between Sounds Reasonable and SBA fell within that authorization. Accordingly, petitioners became newly obligated under the 1979 agreement—*i.e.* they guaranteed it. Thus, this action is not barred by the statute of limitations because it was brought within six years of the breach of the 1979 agreement.

3. Contrary to petitioners' contention (Pet. 5-11), the decision below is not inconsistent with a provision of the District of Columbia Code. That provision—D.C. Code § 28-3504 (1981)—provides that "an acknowledgement * * * is not sufficient * * * to take the case out of the operation of the statute of limitations * * * unless the acknowledgement * * * is in writing, signed by the party chargeable thereby." Petitioners state that they did not sign the 1979 modification agreement; therefore, they argue that the 1979 agreement should not be used to reset the statute of limitations. But the court of appeals was careful to note that the 1979 modification agreement was not simply an "acknowledgement" of debt; it was a " 'new agreement supported by consideration.' " Pet. App. 16a (citation omitted). And, as the court of appeals held, petitioners agreed to guarantee Sounds Reasonable's obligations under such a new agreement when they signed the original

guaranty. Accordingly, the court of appeals' decision in no way depended on whether petitioners "acknowledged" the debt in 1979. Under the terms of the original agreement that they signed in 1973, petitioners were bound by the 1979 modification agreement, and they were liable when Sounds Reasonable defaulted on its obligations under that agreement.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1989

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[3] For this reason, petitioners mistakenly rely (Pet. 8-11) on cases suggesting that federal courts should borrow state law when considering contracts with the federal government. The court of appeals did not reject any applicable law of the District of Columbia.

* The Solicitor General is disqualified in this case.

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